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FLEXTRONICS SHAH ALAM SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, SHAH ALAM
VAZEER ALAM MYDIN MEERA J
[JUDICIAL REVIEW NO: BA-25-73-12-2017]
1 APRIL 2018

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CIVIL PROCEDURE: *Judicial review – Application for – Revenue law – Applicant sought order to quash notices of additional assessment – Whether notices of additional assessment valid – Whether commission payments deductible – Power to make transfer pricing adjustments – Whether there was provision for domestic remedy to address applicant's complaints – Whether applicant exhausted statutory appeal mechanism – Whether leave for judicial review ought to be granted – Rules of Court 2012, O. 53 r. 3(1)*

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REVENUE LAW: *Income tax – Additional assessment – Application for judicial review to quash notices of additional assessment – Whether notices of additional assessment valid – Whether commission payments deductible – Power to make transfer pricing adjustments – Whether there was provision for domestic remedy to address applicant's complaints – Whether applicant exhausted statutory appeal mechanism – Income Tax Act 1967, ss. 33(1), 91(1) & 140*

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The respondent conducted an audit on the applicant for the years of assessment ('YA') 2007 to 2012. After initial exchanges of correspondence between the parties, there was a period of inactivity for 21 months before the respondent wrote to the applicant and attached its tax computations for the YA 2007 to 2013 and, *inter alia*, disallowed commission payments which were made by the applicant to Flextronics Sales & Marketing (A-P) Ltd ('commission payments'). The applicant objected against the respondent's findings and argued that (i) no adjustments should be made by the respondent for the time-barred YA; and (ii) commission payments were clearly deductible under s. 33(1) of the Income Tax Act 1967 ('the ITA'). The respondent disallowed the commission payments and, for the first time since the commencement of the tax audit, claimed that it had the power to make transfer pricing adjustments to the applicant's tax affairs. The respondent then issued notices of additional assessment ('the NOAA') amounting to RM62,954,252.40, in additional taxes and penalties for YA 2007 to 2012. In the present application for judicial review under O. 53 r. 3(1) of the Rules of Court 2012 ('the ROC'), the applicant sought for (i) an order to quash the NOAA; and (ii) a declaration that the NOAA were invalid in law. Supporting its application, the applicant submitted that the respondent (i) had no power to make transfer pricing adjustments; (ii) in raising the NOAA, acted in complete and utter defiance and wilful disregard and contrary to the *Boston Consulting Group Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* ('the

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BCG case') where it was held that the imposition of taxes and penalties by the respondent in reliance upon the Transfer Pricing Guidelines 2003 and/or s. 140 of the ITA was invalid in law; (iii) disregarded the statutory period of limitation provided under s. 91(1) of the ITA and illegally attempted to read the provision retrospectively; and (iv) acted beyond its powers in making purported transfer pricing adjustments on what was essentially third party pricing. The Attorney-General objected against the present application on the grounds that, *inter alia*, (i) leave for judicial review should not be granted where there is, in law, provision for domestic remedy to address the applicant's complaints; and (ii) since the applicant filed an appeal to the Special Commissioners for Income Tax ('the SCIT') and the appeal was pending, the applicant had not exhausted the statutory appeal mechanism.

Held (allowing application):

(1) The non-existence of domestic remedy was not a pre-requisite under O. 53 of the ROC. Nowhere in O. 53 is it stated that the existence of a domestic remedy would bar an application for judicial review and neither is it a requirement established in case law. The existence of the statutory appeal mechanism under s. 99 of the ITA, does not, by itself, bar an application for leave for judicial review under O. 53 of the ROC. (para 26)

(2) The applicant, facing an imminent risk of having to pay the NOAA, was clearly not a busybody with trivial complaints. The applicant passed the threshold test for leave as it was clearly affected by the decision of the respondent, a public authority. When the applicant had demonstrated a case on its merits and when the applicant's case was not frivolous or vexatious, leave should be given to proceed to the substantive merits stage to challenge the legality of respondent's alleged illegal conduct of charging the applicant approximately RM62.9 million in disputed taxes and penalties, which on the surface, seemed to be contrary to the order in the *BCG* case and might have contravened statutory time bar. (para 25)

(3) The availability or non-availability of an alternative remedy was irrelevant at leave stage and should be raised at merits stage. The existence or non-existence of a sufficient alternative remedy was something that should be canvassed at the substantive stage and was therefore a premature objection to be raised now at leave stage. Furthermore, the issue of alternative remedy should not be considered at leave stage as the relief and/or orders sought by the applicant did not come within and did not overlap with the powers of the SCIT. (paras 29 & 32)

Case(s) referred to:

Chan Tsu Chong & Ors v. Suruhanjaya Pilihan Raya Malaysia & Ors [2017] 1 LNS 780 HC ***(refd)***

Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363 CA ***(refd)***

Government of Malaysia & Anor. v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

The Boston Consulting Group Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (Originating Summons No: 24-82-12-2013) (Unreported) ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 33(1), 91(1), (5), 99, 113(2), 140, 140A

Rules of Court 2012, O. 53 rr. 2(4), 3(1)

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] This is an application for leave by the applicant for judicial review under O. 53 r. 3(1) of the Rules of Court 2012 to move the court for the following reliefs:

(a) an order of *certiorari* to quash the notices of additional assessment for the years of assessment ("Y/As") 2007, 2008, 2009, 2010, 2011 and 2012 dated 4 December 2017 which were issued by the respondent under the Income Tax Act 1967 ("ITA") (hereinafter collectively referred to as "the disputed NOAAs");

(b) a declaration that the disputed NOAAs are invalid in law;

or, in the alternative to the relief referred to in sub-paras. (a) and (b) above:

(c) a declaration that the imposition of taxes and penalties under the disputed NOAAs for Y/As 2007, 2008 and 2009 (up to 31 December 2008) by the respondent in reliance upon the "Transfer Pricing Guidelines" issued by the Inland Revenue Board and/or the respondent on 2 July 2003 under the cover of the respondent's letter dated 2 July 2003 (hereinafter referred to as "Transfer Pricing Guidelines 2003") and/or s. 140 of the ITA is invalid in law as the respondent and the Inland Revenue Board did not have the power to raise the disputed NOAAs for Y/As 2007, 2008 and 2009 (up to 31 December 2008);

(d) a declaration that the imposition of taxes and penalties under the disputed NOAAs for Y/As 2009 (commencing 1 January 2009), 2010, 2011 and 2012 by the respondent in reliance upon the "Transfer Pricing Guidelines" issued by the Inland Revenue Board and/or the respondent on 20 July 2012 (hereinafter referred to as "Transfer Pricing Guidelines 2012") and/or s. 140A of the ITA is invalid in law as the respondent and the Inland Revenue Board did not have the power to raise the disputed NOAAs for Y/As 2009 (commencing 1 January 2009), 2010, 2011 and 2012;

or, in the further alternative to the relief referred to in sub-paras. (a) to (d) above:

(e) an order of prohibition to prohibit the respondent from taking any steps pending the determination of the validity of the disputed NOAAs;

or, in the alternative:

(f) an order of *mandamus* to compel the respondent to grant a standover of all taxes and penalties purportedly assessed under the disputed NOAAs pending the determination of the validity of the disputed NOAAs;

or, in the further alternative to the relief referred to in sub-paras. (a) to (f) above:

(g) an order of *certiorari* to quash the penalties under s. 113(2) of the ITA;

(h) a declaration that the applicant is not liable to pay penalties under s. 113(2) of the ITA;

or, in the further alternative to the relief referred to in sub-paras. (a) to (h) above:

(i) a declaration that the taxes and penalties under the disputed NOAAs are excessive and erroneous and should be reduced;

and as a consequence of the relevant orders granted above,

(j) an order of *mandamus* to compel the respondent to discharge, revise, revoke or amend, as the case may be, the disputed NOAAs;

(k) an *order* of *mandamus* to compel the respondent to refund any taxes and penalties paid by the applicant under the disputed NOAAs, if any;

or, in the alternative to the relief referred to in sub-paras. (j) and (k) above:

(l) an order of *mandamus* to compel the respondent to allow the applicant to utilise any tax refunds owed by the respondent to be set off against the taxes and penalties under the disputed NOAAs;

(m) a declaration that the applicant can utilise any tax refunds owed by the respondent to be set-off against the taxes and penalties under the disputed NOAAs;

(n) an order of *mandamus* to compel the respondent to comply with the rules of natural justice and fairness; and

(o) costs, interest and such further, alternative, consequential or other relief as this honourable court deems fit.

The Facts

[2] Learned counsel for the applicant has quite comprehensively set out the material facts and I have adopted them and set them out below.

[3] The applicant is a taxpayer. The respondent conducted an audit on the applicant in August 2013 for Y/As 2007 to 2012 ("tax audit"). In this regard, there were initial exchanges of correspondence between the applicant and the respondent. Thereafter, there was a period of inactivity for about 21 months before the respondent, in October 2016, contacted the applicant to once again request further documents and information.

[4] Subsequent to further exchanges of correspondence between the applicant and the respondent, on 8 June 2017, the respondent wrote to the applicant and attached its tax computations for Y/As 2007 to 2010 and amongst others, disallowed commission payments which were made by the applicant to Flextronics Sales & Marketing (A-P) Ltd in the amount of RM8,273,000 for Y/A 2008 and RM355,883 for Y/A 2009 ("commission payments").

[5] On 30 June 2017, the applicant wrote to the respondent objecting to the respondent's findings in its letter of 8 June 2017. The applicant reiterated its position that no adjustments should be made by the respondent for the time-barred Y/As. The applicant also furnished supporting documents and provided clarification and information in support of its position that, amongst others, the commission payments are clearly deductible under s. 33(1) of the ITA.

[6] Further to exchanges of correspondence as well as meetings held between the applicant and the respondent, the respondent revised its tax computations *vide* its letter dated 8 November 2017 and, amongst others, maintained its position to disallow the commission payments. However, the respondent then proceeded, for the first time since the commencement of the tax audit back in 2013, and in writing, to claim that it had the power to make "transfer pricing adjustments" to the applicant's tax affairs.

[7] Subsequently, the respondent issued the disputed NOAAs *vide* its letter dated 4 December 2017, amounting to RM62,954,252.40 in additional taxes and penalties for Y/As 2007 to 2012.

The Applicant's Contentions

[8] The applicant contends that the raising of the disputed NOAAs is *ultra vires* the powers conferred on the respondent and done in access of jurisdiction on the following grounds.

(a) Firstly, the applicant contends that the respondent has no power in law to raise the disputed NOAAs for the time-barred years. In this regard, the applicant contends that:

(i) the disputed NOAAs for all Y/As are time-barred save for Y/A 2012;

(ii) the respondent's purported reliance on its Transfer Pricing Guidelines 2003 ("TPG 2003") and/or s. 140 of the ITA for Y/As 2007 to 2008, and its Transfer Pricing Guidelines 2012 ("TPG 2012") and/or s. 140A of the ITA for Y/As 2009 to 2011 in raising the disputed NOAAs is misconceived as neither the TPG 2003 or the TPG 2012 nor ss. 140 or 140A of the ITA empowers the respondent to raise the disputed NOAAs for the time-barred Y/As.

(b) Secondly, the applicant contends that the respondent's attempt to make transfer pricing adjustments in respect of Y/As 2007, 2008 and 2009 (up to 31 December 2008) by relying upon s. 140 of the ITA and/or TPG 2003 is illegal. In this respect, the applicant states that:

(i) during the period prior to 1 January 2009, there was no mandatory legal or statutory provision in Malaysia which specifically authorised the respondent to make transfer pricing adjustments;

(ii) the respondent's attempt to make transfer pricing adjustments in respect of Y/As 2007, 2008 and 2009 (up to 31 December 2008) under s. 140 of the ITA and/or the TPG 2003 is clearly unauthorised in law as s. 140 of the ITA does not empower the respondent to do so, and additionally, the TPG 2003 does not have the force of law;

(iii) transfer pricing adjustments are now allowed under s. 140A, and only came into effect from 1 January 2009, *vide* the Finance Act 2009, confirming that the respondent had no such power prior to that.

[9] In support of this contention, learned counsel for the applicant relies on the High Court case of *The Boston Consulting Group Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (Originating Summons No. 24-82-12-2013) ("*BCG* case"), where the court in deciding in favour of the taxpayer (Boston Consulting), had held that the imposition of taxes and penalties by the

respondent in reliance upon the TPG 2003 and/or s. 140 of the ITA is invalid in law as the Director General of Inland Revenue ("DGIR") did not have the power to raise assessments in that regard and had operated under a mistake of law. Although the DGIR had initially filed a notice of appeal to the Court of Appeal on 16 February 2015 to appeal against the decision of the High Court, the DGIR subsequently withdrew its notice of appeal on 21 August 2015. Hence, the decision of the High Court in the *BCG* case is still good law and binding upon the respondent.

[10] Thus, learned counsel for the applicant contends that as the applicant's financial year end for Y/A 2009 falls on 31 March 2009, the respondent does not have the power to intervene and make transfer pricing adjustments for part of Y/A 2009, ie, the period from 1 April 2008 to 31 December 2008.

[11] Hence, the applicant contends that the respondent has attempted to circumvent its glaring lack of power or authority to make transfer pricing adjustments by relying on mere guidelines in the form of TPG 2003 and/or s. 140, a general anti-avoidance provision, to which the necessary elements to constitute tax avoidance have not been established or even raised by the respondent against the applicant. The applicant states that the respondent merely made bare assertions in his letter dated 4 December 2017 that s. 140 applies to the applicant without adducing any evidence or providing any particulars, reasons or basis to substantiate its allegations.

[12] Hence, the applicant argues that the respondent in seeking to make transfer pricing adjustments, has patently misused s. 140, which is an anti-avoidance provision, for an extraneous and unlawful purpose.

[13] Thus, the applicant submits that, notwithstanding the clear decision in the *BCG* case, the respondent has blatantly disregarded the same and acted in complete and utter defiance and wilful disregard of and contrary to the decision in the *BCG* case, where the respondent eventually conceded and discontinued its appeal to the Court of Appeal. This, the applicant contends, constitutes error or illegality, if not perversity, on the face of the record that must be heard by the High Court *via* judicial review.

[14] Thirdly, the applicant argues that the respondent's attempt to make transfer pricing adjustments in respect of Y/As 2009 (commencing 1 January 2009), 2010 and 2011 by relying upon TPG 2012 is also illegal, as the TPG 2012, which was issued by the Inland Revenue Board and/or the respondent to replace TPG 2003, also does not have the force of law.

[15] The applicant further contends that the respondent's purported transfer pricing adjustments upon the applicant for Y/As 2009 (commencing 1 January 2009), 2010 and 2011 are also time-barred. The applicant states that whilst s. 91(5) of the ITA (read together with s. 140A of the ITA), allows

the respondent to make an assessment/additional assessment within seven years from the year of assessment, this provision, which was enacted *vide* the Finance Act (No. 2) Act 2014, only came into effect on 30 December 2014, and thus in the absence of clear language in the provision that it is to apply retrospectively, s. 91(5) must only be applied prospectively.

[16] Since s. 91(5) of the ITA was not enacted to apply retrospectively, the applicant argues that the respondent is therefore illegally attempting to read a prospective amendment to the law retrospectively. Thus, the applicant contends that the applicable provision for Y/As 2009 (commencing 1 January 2009), 2010 and 2011 would be s. 91(1) of the ITA which allows the respondent to make an assessment/additional assessment within five years from the year of assessment, and hence it follows therefrom that the respondent is out of time for these relevant Y/As and has acted illegally and in access of jurisdiction.

[17] Fourthly, the applicant states that the respondent has erred in making the purported transfer pricing adjustments on third party pricing. The applicant's argument is that even assuming that the respondent has the power and/or jurisdiction to raise the disputed NOAAs under the ITA, which the applicant denies, the respondent has clearly failed to recognise that the pricing at which the applicant had sold to its related party was the same price at which its related party had on-sold to its end customers, ie, Casio Japan.

[18] The applicant states that whilst the applicant was initially incorporated in Malaysia under the Companies Act 1965 on 23 October 1990 as Casio (Malaysia) Sdn Bhd, Flex Ltd (formerly known as 'Flextronics International Limited') had, in October 2002, acquired the applicant by way of a master purchase agreement with Casio Computer Co. Ltd. Casio or any of Casio's group entities have not held any shares and/or ownership in the applicant since October 2002. Hence, the applicant contends that the respondent has acted beyond its powers in making purported transfer pricing adjustments on what is essentially a third party pricing.

[19] The key issues of contention raised by the applicant can be summarised as follows:

(a) the respondent has no power in law to make transfer pricing adjustments under TPG 2003, TPG 2012 and/or s. 140 of the ITA;

(b) in raising the disputed NOAAs, the respondent acted in complete and utter defiance and wilful disregard and contrary to the High Court order in the *BCG* case;

(c) the respondent disregarded the statutory period of limitation provided under s. 91(1) of the ITA and has illegally attempted to read s. 91(5) of the ITA retrospectively; and

(d) the respondent has acted beyond its powers in making purported transfer pricing adjustments on what is essentially third party pricing.

The Objection By The Honourable Attorney General

[20] The sole ground of objection by the Honourable Attorney General is that leave for judicial review should not be granted where there is in law provision for domestic remedy to address the complaints raised by an applicant. The learned Federal Counsel appearing for the Honourable Attorney General submits that the applicant being dissatisfied and aggrieved by the disputed NOAAs should file an appeal to the Special Commissioners for Income Tax Income Tax ("SCIT") as provided in s. 99 of the ITA. The learned Federal Counsel further contends that since the applicant has filed an appeal to the SCIT and the appeal is pending, it has not exhausted the statutory appeal mechanism, and thus the filing of this leave for judicial review is an abuse of process. In this regard, the learned FC has referred to the Federal Court's decision in *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563.

[21] In response to that argument, learned counsel for the applicant submits that the argument must be rejected for they have failed to address the following key points:

(i) the threshold for leave is low – *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; [2006] 3 MLJ 164; *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525;

(ii) the overwhelming weight of authorities including, and in particular, *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363; [2007] 6 MLJ 193 and *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563, demonstrate that the existence or non-existence of an alternative remedy can and should be raised at the substantive stage and it is premature to raise it at the leave stage;

(iii) the Honorable Attorney General and respondent cannot deny that the Special Commissioners of Income Tax ("SCIT") cannot order the repayment or set-off of any tax refunds and numerous other prayers sought – there is simply no alternative remedy for this and the appeal to the Special Commissioners is therefore inadequate and insufficient;

(iv) there are clear issues of illegality as the respondent does not have the power to make transfer pricing adjustments prior to 31 December 2008 by virtue of the *BCG* case and that s. 91(5) of the ITA does not have retrospective effect;

(v) the objections of the learned Federal Counsel and the respondent hark back to the old and regressive era of administrative law which was rejected by the Federal Court in *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 and *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1, where a broader approach to judicial review was taken.

Analysis And Decision

[22] Having considered the facts stated in the applicant's affidavit in support and the statement filed by the applicant, and further having considered the law and case authorities cited, I am inclined to accept the arguments advanced by the applicant and grant leave for the following reasons.

[23] Order 53 r. 2(4) of the Rules of Court 2012 provides that:

> Any person who is **adversely affected** by the decision of any public authority shall be entitled to make the application. (emphasis added)

The law relating to *locus standi* in applications for judicial review under O. 53 was restated by the court in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; [2006] 3 MLJ 164 as follows:

> There is a single test of threshold of *locus standi* for all the remedies that are available under the order. It is that the applicant should be **'adversely affected'**. The phrase calls for a **flexible approach**. (emphasis added)

And subsequently, the "adversely affected" test was affirmed by the Federal Court in *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145, where the court held that the applicant only has to show that he has a "real and genuine interest in the subject matter".

[24] In the case of *Chan Tsu Chong & Others v. Suruhanjaya Pilihan Raya Malaysia & Ors* [2017] 1 LNS 780 I had applied these established principles and held that:

> The threshold for leave in a judicial review application as stated in decided case is "very low" and leave should only be denied if the application is proven to be frivolous or vexatious. …
>
> … A similar observation of a "very low" threshold for leave was made by the Court of Appeal in *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi* [2015] 3 AMR 35 at 27 where the court emphasised that at the leave stage "a flexible approach" should be taken and the court should not "shut out summarily" any applicant. …

[25] I accept that the applicant, which is facing an imminent risk of having to pay the amount of the disputed NOAAs ie, RM62,954,252.40, is clearly not a busybody with trivial complaints. The applicant has passed the threshold test for leave as it is clearly affected by the decision of the respondent, who is a public authority. When the applicant has demonstrated a case on its merit and when the applicant's case is not frivolous or vexatious, leave should be given to proceed to the substantive merits stage to challenge the legality of the respondent's alleged illegal conduct of charging the applicant approximately RM62.9 million in disputed taxes and penalties, which on the surface seems to be contrary to the High Court order in the *BCG* case and may have contravened statutory time bar.

[26] As to the issue of the exhaustion of the alternative statutory remedy of appeal to the SCIT, I find that the non-existence of domestic remedy is not a pre-requisite under O. 53 of the Rules of Court 2012. It is pertinent to note that nowhere in O. 53 is it stated that the existence of a domestic remedy will bar an application for judicial review, neither is it a requirement established in case law. In this regard, I am of the opinion that the existence of the statutory appeal mechanism under s. 99 of the ITA does not by itself bar an application for leave for judicial review under O. 53 of the Rules of Court 2012.

[27] My view in this regard is fortified by the pronouncement of the Court of Appeal in *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363; [2007] 6 MLJ 193, which by the doctrine of *stare decisis*, is binding on me. In that case, the learned Suriyadi JCA (as he then was) in speaking for the Court of Appeal held that:

> … **The all paramount question in this case is, must the issue of domestic remedy be canvassed and decided by the judge at this early stage ie at the stage of the leave application**? Before discretion is to be applied a judge must be appraised of all the facts first. Nothing must be arbitrary. Here the scenario was as follows: the judge had no affidavit in reply to peruse and consider, an incomplete set of evidential and legal argument regarding the factor of domestic remedy, the appellants were harping on some other equally serious issue let alone supported by evidence that the Minister could be biased, to expect the judge to apply his discretion correctly then (as regards the issue of alternative remedy), was an unreasonable expectation.
>
> In fact as there was no affidavit in reply the appellants should have won hands down in the circumstances of the case. Surely the purpose of leave would be defeated if such a substantive matter such as this must be resolved at such an early stage. Recently too, in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 the Court of Appeal, when dealing with a similar issue, had ruled that **the question of exhaustion of domestic remedy was not an issue at the leave stage. The issue of alternative remedy went to the merit of the substantive application,** with the court only to gauge whether the application before it was frivolous or not. (emphasis added)

[28] In fact, in the Federal Court case of *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563, the learned Suriyadi FCJ held as follows:

> … Having perused the evidence adduced before us, we are satisfied that apart from there being no flaw detectable in the decision making process there was also no illegality or irrationality in the decision. That being so the appellant's decision must stand. The respondents therefore are liable to the withholding tax.
>
> We have an additional reason why the appeal must be allowed. A rather disquieting factor which we detect is that, **even though the respondents are not prevented from seeking remedy under O. 53 of the RHC 1980,** the respondents have failed to satisfy some of the statutory requirements. (emphasis added)

[29] Thus, I accept the learned applicant's counsel's submission that when the pronouncement of the Federal Court in *Alcatel-Lucent* is read together with the *ratio decidendi* in *Chin Mee Keong* and *QSR Brands Bhd*, the availability or non-availability of an alternative remedy is irrelevant at the leave stage and should be raised at the merits stage. The existence or non-existence of a sufficient alternative remedy is something that should be canvassed at the substantive stage and is therefore a premature objection to be raised now at the leave stage.

[30] Even before the *Alcatel-Lucent* case, the courts have long acknowledged that the availability of an alternative remedy in the form of an appeal process will not bar an application for judicial review. The following high authorities are on point:

(i) *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185, where the then Supreme Court held that:

> **A clear principle is reiterated here ie, it is not a rigid rule that whenever there is an appeal procedure available he should be denied judicial review.** Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances. … In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice. (emphasis added)

(ii) *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1, the Federal Court held as follows:

> … we recognise that there are certain classes of cases such as planning, employment cases and tax cases … *where a statute provides for a specialized appeal procedure, and so the courts understandably may not grant judicial review but this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess or abuse of power, or breach of the rules of natural justice*.

[31] Therefore, the existence or non-existence of an alternative remedy and whether that is relevant or not should only be evaluated by the court after the affidavit in reply of the respondent is filed and all the relevant material facts are placed before the court for comprehensive consideration, and is not to be considered at leave stage when the threshold test is low and where the court acts upon the affidavit of the applicant alone.

[32] Another reason why the issue of alternative remedy should not be considered at the leave stage in this case is that the following relief and/or orders sought by the applicant do not come within the powers of the SCIT nor do they overlap with the powers of the SCIT:

(i) an order of prohibition to prohibit the respondent from taking any steps, enforcement action or proceedings pending the determination of the validity of the disputed NOAAs;

(ii) an order of *mandamus* to compel the respondent to grant a standover of all taxes and penalties assessed under the disputed NOAAs pending the determination of the validity of the disputed NOAAs;

(iii) an order of *mandamus* to compel the respondent to allow the applicant to utilise any tax refunds owed by the respondent and/or taxes overpaid to be set-off against the taxes and penalties assessed under the disputed NOAAs;

(iv) a declaration that the applicant can utilise any tax refunds owed by the respondent and/or taxes overpaid to be set-off against the taxes and penalties assessed under the disputed NOAAs; and

(v) an order of *mandamus* to compel the respondent to comply with the rules of natural justice and fairness to enable the applicant to prepare its case for appeal to the SCIT.

I agree that, since the above remedies are not available before the SCIT, it cannot be gainsaid that there are alternative remedies available to the applicant in this regard, and as such they must necessarily be taken by way of judicial review.

[33] In the premise of the foregoing, I granted leave for judicial review as prayed.

[34] The applicant had also sought stay of proceedings against the respondent in respect of the disputed NOAAs pending disposal of this judicial review. I was not prepared to consider the stay application on an *ex parte* basis and had directed that the respondent be served with the cause papers and affidavits be filed by both parties, and that the stay application would then be heard on an *inter partes* basis. In the interim, upon the application for counsel for the applicant, I granted an interim stay pending the hearing of the stay application on an *inter partes* basis. I had exercised my discretion to allow an interim stay primarily upon the consideration of the large amount of tax that had been raised by the respondent, ie, approximately RM62.9 million, which according to counsel would cause severe cash flow problems to the applicant and would adversely affect its financial position as a going business entity.

[35] On the date fixed for hearing of the *inter partes* stay application, the Senior Federal Counsel appearing for the respondent asked for time to reply the applicant's last affidavit. I had allowed that application for time and the hearing of the stay proper is now fixed for some time in May 2018.

[36] Orders accordingly.